No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the District of Arizona.

FAVOUR & CORNICK, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

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Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged this.....day of January, 1921.

.....
Attorneys for Defendant in Error.

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Note: The Transcript of Record will be referred to herein as "Tr.," giving page number.

STATEMENT OF CASE.

Mike Koso, a citizen of Finland, Russia, instituted this action in the United States District Court of Arizona, in March, 1918, against the United Verde Extension Mining Company, to recover damages for injuries alleged to have been received on the first day or night of his employment in a drift on the 1200 level in the mine of the Company at Jerome, Arizona. Koso alleged that some rock or earth fell upon his back when he was shoveling in said drift where he had been directed to work, and that it "cut, bruised, broke and mangled plaintiff's shoulder, back and foot." The complaint set up two separate counts; the first count alleged that the

accident occurred in the course of his employment in a hazardous occupation, and was due to a condition or conditions of the employment, and purported to state a cause of action under the Employer's Liability Law of Arizona, on account of injury received as a result of an unavoidable accident due to an inherent risk of a hazardous occupation. (Tr. 1 to 4). The second count alleged that the accident occurred because the Company negligently failed to timber the drift, which was negligently left in an unsafe condition, and but for said negligence Koso would not have received the alleged injury. (Tr. 4 to 6).

The plaintiff in error, within the time for answering, filed its demurrer to the whole complaint on the ground that the said complaint purported to state two causes of action, one ex contractu and one ex delicto, united in one cause, contrary to the laws of Arizona, and upon the ground that the said Employer's Liability Law was in violation of the Constitution of the United States. The plaintiff in error also filed its demurrer to each of the alleged causes of action, and filed its pleas in bar thereto. (Tr. 11). Thereafter and before any hearing or trial by the Court, the plaintiff in error filed its motion, supported by affidavit, that the defendant in error be required to give security for costs, which motion was overruled by the court. The plaintiff in error, by its counsel, was present on August 4th, 1919, at the adjourned term of the said court, prepared to proceed with the trial of the case,

but neither the plaintiff below nor his counsel were present or represented. Thereafter at the regular term of the said court, to-wit, on March 22nd, 1920, the said demurrers were called up by the court, and on motion of counsel for the defendant in error, the court ordered that the said defendant in error "elects to proceed under the first cause of action," and that the second cause of action be dismissed. The demurrer of the plaintiff in error to the said first cause of action was also ordered overruled. The plaintiff in error then and there excepted to the ruling of the court. (Tr. 18).

The cause was tried by a jury on March 25th, 1920. (Tr. 19). At the trial, the evidence (Tr. 34 to 37) showed that the defendant in error, Koso, had been employed by the Company, on December 14, 1917, and was working in the first shift of his employment, when the alleged accident occurred, on the morning of December 15th, 1917. That Koso had had eighteen years experience as a miner prior thereto; that he was working on this shift with two other miners, but was alone at the time the alleged accident occurred. Koso stated that he was bending to shovel, about fifteen feet from the face or end of the drift, when some rock fell on him and knocked him down; that after about fifteen minutes he got up and walked "against the wall" to the cage station and after about an hour he was put in the cage and taken to the surface, and walked with the help of another man to the dry-house where he was helped to take off his clothing and put on other

clothes, and taken to the hospital where he remained about two weeks, and then went to Phoenix, Arizona, where he had lived chiefly during the subsequent two years and more prior to the trial; that his shoulder blade and back had "changed a little better" and that he had done a "little easy work in a cigar store or pool hall," and "was able to do easy work but not hard work."

The foreman who was immediately in charge of Koso at the time of the accident, Sampson Jiles, testified (Tr. 41 to 43) he was not in the employ of the Company at the time of the trial, that he put Koso to work and instructed him to pick down the loose rock before shoveling, that the drift, about seven feet, ten inches high, was timbered with no open spaces to within three feet of its end; that in making his rounds, and going in the cage to the 1200 level he had seen Koso coming out alone, and when Koso told him that he had been hurt, the witness had gone up with him in the cage and to the dry-house; that Koso walked all the way without assistance and had undressed himself and taken a hot bath and re-dressed himself; that the witness had examined Koso's back and found scratches on his shoulder and red marks on his back, and had called an automobile and sent Koso to the hospital in accordance with orders that all cases, even of slight injury, should be sent to the hospital; that the witness afterwards went to the drift where the accident happened and found about a bushel of fine

waste at the end of the drift, containing no lumps as large as his fist.

The only medical testimony introduced by the defendant in error was that of his medical witness, Dr. Wylie, who stated that by looking through a fluroscope he observed (Tr. 38) "in the first place he has an hernia, a beginning hernia; a starting hernia on the right side. Hernia is another name for rupture. He has lost about fifty per cent of the power of his right hand. There has been an injury to the scapula or shoulder-blade. And there has been an injury to the fifth lumbar vertebra on the right side that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebra with the first sacral vertebra. The injury to the scapula, the bone injury, has united and there is more bony tissue there at the present time than there was before he was injured." "Q. What did that injury consist of?" "A. Fractures." This was all of the testimony given in regard to the physical condition of Koso, as alleged to have been determined by a medical examination. The quotations of Koso, hereinbefore set out, were pertinent statements made by him with respect to his physical condition. It will be observed that there is no allegation in the complaint that Koso was, at that time, suffering from hernia or any injury to either hand, or from injury in the said regions (Tr. 1 to 6) and there is no evidence whatever that these alleged conditions of hernia and of partial loss of power of the right hand were due to the

alleged accident, and further, the examination at which the facts alleged were discovered, was remote more than two years from the date of the accident, on account of which damages were sought to be recovered. The said medical expert specifically states that the injury to the fifth lumbar vertebra "has been repaired by nature" and that the bone injury to the scapula has united. The reply "fractures" is indefinite as to whether it was intended by the witness to refer to the scapula alone, or was intended to infer that there was a fracture of the vertebra. The medical testimony of two physicians was introduced by the plaintiff in error, and they were asked hypothetical questions as to the results that would follow a fracture of the scapula and a fracture of the fifth lumbar vertebra (Tr. 44 to 46). The uncontradicted testimony was that great pain would accompany any effort of a person to undress within two hours after a fracture of the scapula and at least temporary paralysis would follow any material fracture of the fifth lumbar vertebra and movement within two hours thereafter would be very labored, if not impossible. The cross-examination of counsel for defendant in error (Tr. 46) of one medical witness, Dr. Southworth, manifestly proceeded upon the theory that there might be a slight injury to the vertebra which would not cause paralysis or be important, and belittling the seriousness and importance of the injury to the vertebra. Not only was there no testimony at all proving or tending to prove that the injuries alleged in the

complaint to have been the result of the accident, permanently impaired the defendant in error, but the testimony of his own medical expert, above quoted, shows clearly that all of the injuries of which Koso complained in his cause of action had been repaired by nature. The testimony showed that Koso, by his attorney, had refused to be examined as to his physical condition when asked by the plaintiff in error, upon a deposition taken in or about August, 1918, a few months after the alleged accident (Tr. 37).

During the trial several prejudicial matters arose, as set forth in the Assignments of Errors (III. to XIV. Tr. 61 to 67) and the Specifications of Error, appearing hereinafter. Said matters included:

(1) An offer in evidence, in the presence of the jury, by counsel for the defendant in error, of incompetent and unauthenticated X-Ray plates, excluded by the Court upon objection, but manifestly without curing and without the possibility of curing the erroneous impression conveyed by said unwarranted offer, that the said plates contained damaging evidence favorable to the defendant in error.

(2) The remark of counsel for the defendant in error that his medical witness, Dr. Wylie, had made examination just before the trial in order to testify, "provided that there was anything to testify about," which manifestly conveyed to the jury unwarrantedly, and without evidence to support, the conclusion or inference that the witness would not

have testified unless there was a very serious injury, due to the accident. (Tr. 38).

(3) The introduction, over objection of plaintiff in error, of American Mortality Tables, without evidence or proof of their applicability or evidence of previous life and habits, or of permanent injury resulting from the accident.

(4) The instructions by the court permitting the jury to consider the Mortality Tables and presuming permanency and future damages, which instructions were excepted to by the plaintiff in error.

At the close of the evidence the plaintiff in error moved the court to direct the jury to return its verdict for the defendant, which motion was denied. The jury returned the verdict for the defendant in error in the sum of $7500. Judgment was entered thereupon. Thereupon plaintiff in error, in due time moved for a new trial on various grounds, including those of excessive damages, insufficiency of evidence, and errors of law in admitting Mortality Tables and permitting the jury to consider them (Tr. 25), which motion was taken under advisement by the court April 20th, 1920 (Tr. 28), and thereafter on June 21st, 1920, the court overruled said motion, to which ruling exception was allowed. Thereupon in due course the plaintiff in error presented its Bill of Exceptions which was duly approved and allowed by the Judge of the District Court (Tr. 35 to 59) and filed its petition for Writ of Error and its Assignments of Errors (Tr. 59 to 69); and a Writ of Error was allowed to bring this cause up for review. (Tr. 74).

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling the motion of the plaintiff in error that the defendant in error be required to give security for costs (Tr. 13 and 17), for the reason that the law directs the granting of such a motion when supported by affidavit, and a denial thereof deprived the plaintiff in error of its right under the law to endeavor to protect itself from expenses of court costs. (Assignment of Error I. Tr. 61.)

II.

The court erred in overruling the demurrer interposed to the complaint upon the ground that said complaint attempted to join an action ex contractu with an action ex delicto (Tr. 9), and in permitting the defendant in error to elect to proceed and to proceed under the Employer's Liability Law of Arizona (Tr. 18), for the reason that under the law of Arizona the time allowed for election had expired, and moreover an election had been made at the time of instituting suit, to which ruling the plaintiff in error duly excepted.

III.

Prejudicial and reversible error occurred when counsel for the defendant in error offered as evidence, without authentication or proof, X-Ray plates (Tr. 38 and 61), under circumstances raising the evident purport that said plates were photographs of portions of the defendant in error; the

medical expert of the defendant in error testified that the X-Ray plates were taken under his direction; counsel for defendant in error then stated: "We offer those X-Rays, if your Honor pleases, photographs, as an aid, and illustrative of the testimony of the witness to be given." Mr. Cornick, on behalf of plaintiff in error, "He took these and developed them himself," to which Mr. Struckmeyer answered, "No, they were not developed by him"; Mr. Cornick, "We object then." The objection was sustained. This erroneous and unwarranted offer of unauthenticated X-Ray plates, without competent proof or evidence to show that they were photographs of the defendant in error, or authenticated in any manner, was prejudicial error because the jury manifestly received the inference that the plates were being kept out to conceal some damaging condition. (Assignment of Error III.) And prejudicial error occurred as follows, to-wit:

The aforesaid medical expert testified, (Tr. 37): "I presume my examination was made to determine his condition for the purpose of testifying in this case"; Mr. Struckmeyer, "That is provided there was anything to testify about"; Mr. Cornick, "We object to that"; for the reason that the remark of the counsel of the defendant in error, Mr. Struckmeyer, was self-serving and gratuitous, and could not be objected to until after it was made, and it conveyed to the jury the plain inference, without evidence or proof, and prejudicial to the plaintiff in error, that the fact the witness was called to tes-

tify proved that he had found a serious condition. (Assignment of Errors III. and IV.)

IV.

The court erred in admitting, over objection of plaintiff in error, American Mortality Tables as evidence, and in permitting them to be considered and argued, for the reason that their applicability to the defendant in error was not shown, there was no proof of the tables, and there was no evidence of permanent injury. (Assignment of Errors, V, VI, VII, and VIII.)

V.

The court erred in denying the motion of the plaintiff in error at the close of the evidence that the jury be directed to return a verdict for the said plaintiff in error (Tr. 64), for the reason that there was no evidence showing that the defendant in error was not negligent and that the accident was not due to his own negligence, to which ruling the plaintiff in error duly excepted. (Assignment of Error IX.)

VI.

The court erred in instructing the jury, over objection of the plaintiff in error, that American Mortality Tables might be considered, as follows:

> "The testimony in this case shows that the plaintiff is now forty-two years of age, and testimony has been received for the purpose of showing, or tending to show that the probable duration of life of a person forty-two

> years is 26.72 years.....Now, this testimony as to the plaintiff's age and his expectancy is based upon the American Mortality Tables which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rate to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case,''

for the reasons set forth in Specification of Error IV above, to which instructions the plaintiff in error duly excepted.

VII.

The court erred, if said Mortality Tables were admissible at all, which plaintiff in error does not admit but specifically denies, in failing to instruct the jury that the Mortality Tables might be totally disregarded in cases where they were otherwise admissible for consideration, and in instructing the jury as follows, to-wit:

> ''And these Mortality Tables were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff's life. It is stated that in an action for personal injury, if the injury is of a permanent character. in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy, standard Mortality Tables are admissible in evidence.''

for the reason that the instruction that Mortality

Tables may be disregarded entirely is a necessary modification, and the instruction quoted assumes the permanency of the injury by its very statement that "if the injury is of a permanent character.... standard Mortality Tables are admissible in evidence," to which instructions plaintiff in error duly excepted.

VIII.

The court erred in instructing the jury (Tr. 67) as follows:

> "The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his expectancy of life, that is a man engaged in hazardous occupations was less than the tables would indicate to one of his age, but the tables are none the less admissible on that account,"

for the reasons stated in Assignment of Error XIV.

The instruction outrightly charges the jury that the Tables might be considered even where these Tables and the basis upon which they are made up are inapplicable to the individual whose case is in question; to which instructions plaintiff in error duly excepted.

IX.

The court erred in instructing the jury as follows, to-wit:

> "If you find for the plaintiff, you should award a fair and reasonable compensation taking into consideration what the plaintiff's income was, what it would probably have been, how long it would have lasted, whether he would have been regularly employed and able to perform labor; whether sickness might overtake him and he would thereby lose as a result thereof and all the contingencies to which he was liable, that is his earning capacity, and then award such compensation as you think would be fair and just,"

for the reason that it charged the jury to consider all the elements of a future permanent damage "if you find for the plaintiff," and the charge that the jury consider what his income probably would have been is speculative, to which instructions plaintiff in error duly excepted. (Assignment of Error XIII.)

X.

The verdict and the judgment thereon are each and both against the law and not sustained by the evidence, by reason of the matters and things set forth in Specifications of Errors, I to IX herein.

XI.

The court erred in denying the motion of plaintiff in error for a new trial (Tr. 29 and 68) for all the grounds set forth in the said motion and by reason of the excessive damages awarded the defendant in error. (Assignment of Error XVII.)

ARGUMENT.

Specification of Error I.

The Court erred in overruling the motion that the defendant in error be required to give security for costs (Tr. 13) as is required of plaintiffs not owning property within the State of Arizona. The law of Arizona provides that where it appears by affidavit that the plaintiff is a non-resident of the state, or is not the owner of property out of which costs could be made by execution sale, the Court shall order the plaintiff to give security for costs. There is an exception to this general requirement, but that exception does not affect this case. A motion was made in this cause by the plaintiff in error, supported by affidavit, in the form upon which orders requiring security for costs have been made in the Superior Court of Yavapai County. If there is to be any specific form of affidavit, it is submitted that the law or a rule of the District Court should so specify, but there is no such specific requirement. It would be impossible for an affiant to make a truthful affidavit in which he would unreservedly state that a certain plaintiff had no property in the state; the manifest intention of the law is that an affiant should state this fact truthfully, and therefore upon information and belief, showing that a reasonable effort had been made to ascertain the fact. Good faith requires that affiant should be encouraged and required to make oath only to what he can state truthfully. It is a

mere subterfuge for a plaintiff to be allowed to challenge the form of an affidavit when he could make oath affirming or denying that he was the owner of property; and if he is such owner, then good faith requires that he so admit instead of refusing to divulge.

The defendant was prejudiced by the denial of the Court of its motion for security for costs (Tr. 17), because it was quite possible that the plaintiff would not give such security or conform to the law, and the case might have been dismissed on that account in accordance with the provisions of the law and the outcome of said case might have been totally different.

Silvas v. Arizona Copper Company, 220 Fed. 116.

Tolman v. S. B. and New York R. R., 92 N. Y. 354.

Banes v. Rainey, 192 N. Y. 286.

Meade Bank v. Bailey, (Cal.) 70 Pac. 297.

The Silvas case was one in which suit was brought by a guardian, and this Court held that the guardian came under the exception to the law; the clear conclusion is that in cases where this exception would not aply, security must be given, under Section 643, R. S. A., 1913, which provides that at any time before trial, on motion of the defendant, supported by affidavit, showing that the plaintiff is a non-resident, or is not the owner of property out of which costs could be made, the Court shall order the plaintiff to give security for costs.

In the Banes case the Court construes the law of New York to be a matter of right for the defendant and to require that security for costs be given, and likewise in the Meade Bank case, the Court construes a statute which provides that costs "may be required by the defendant" as vesting "in the defendant the right to have the bond, and the Court cannot, against his will, deprive him of that right."

Specification of Error II.

The Court erred in overruling or failing to act upon the demurrer (Tr. 9) interposed by the defendant below to the whole complaint and in allowing the plaintiff below to elect to proceed (Tr. 18) under the Employer's Liability Law. The complaint contains one cause or count purporting to be based upon the Employer's Liability Law of Arizona, and another count based upon Common Law Negligence, and states facts to show that the accident was due to some defect or negligence. The defendant's demurrer should have been sustained and the plaintiff required to proceed, if he proceeded at all, upon the Common Law Negligence count, treating as immaterial the allegations inconsistent therewith, for the following reasons:

The Statute of Arizona requires that election of the particular remedy, (three of which are available to an employee) is to be made by the employee by bringing suit. An employee may put off his election, but certainly not beyond the two-year limitation

provided in the statutes. The law contemplates and requires that an employee must institute and prosecute a suit within the two-year limitation on the remedy he elects, and it necessarily follows that he must make an election within that period. When an employee attempts to bring an action setting up two of the remedies, as in this case, he evidently does not intend to make an election, but on the contrary seeks to avoid making any specific election. If he is permitted to thus avoid or be held to avoid an election, and is permitted to make his election more than two years after the cause of action has accrued, as was done in this case, the cause having accrued in December, 1917, and an election having been permitted in March, 1920, then the law and the limitation is made ineffective, is violated and is made void, when a reasonable construction could be given that would make the law effective in such case, to-wit, the plaintiff could, and should have been held to have made his election at the time of the institution of the suit (as is contemplated and required by law), and if his complaint attempts to allege two inconsistent causes of action, the Court should determine from the facts stated in the complaint as a whole, which cause, negligence or otherwise, the facts tend to support and should rule that such cause had been elected, and should require the plaintiff to proceed thereunder, and hold that the limitations had run as against any other remedy or election where two years shall have passed as in this case. It is submitted that the Court should not

have permitted the plaintiff to elect on March 25th, 1920, to proceed under the Employer's Liability Law; that the election was void because more than two years had elapsed from the time of the accident and the accruing of his right of action; but the Court should have sustained the defendant's demurrer and have ruled that the time for any attempt to elect had expired and that the facts alleged in the complaint as a whole showed the attempt to allege a Common Law Negligence case and therefore an intention or election to proceed thereunder and the plaintiff was bound thereby. This is so because the bases of the two counts are totally inconsistent, the one (Tr. 1) is based upon the allegation of a conclusion of the pleader that the accident was due to a condition of the employment in a hazardous occupation, while the other (Tr. 4) is based upon the allegation of **facts** showing the cause of the accident was that it was due to the negligence of the defendant and "but for said negligence of defendant, said injuries would not have been received." If an action is due to acts of negligence, how can it be due to a condition of the employment in a hazardous occupation and to a danger inherent therein and unavoidable as provided in the Employer's Liability Law? It is to be assumed that a plaintiff in pleading facts considers them to be true or at least believes them to be true. The **facts** alleged should determine the kind of action. Taking the complaint as a whole in this case, the facts clearly show that if there is any cause of action it is one

based upon an accident due to negligence (Tr. 5) and not to an unavoidable condition of a hazardous occupation. It is submitted therefore that the Court, since more than two years had elapsed from the accrual of the right of action, should have required the plaintiff to proceed upon the Common Law Negligence action. In fact the plain declaration of the law of Arizona requires an election in all cases of personal injury when and by institution of suit and a logical interpretation would require that the institution of any suit for personal injury should be held to be the election of such remedy as the facts are determined by the Court to fit. All the more, should there be no construction of the law that will permit an election to be made after the two-year limitation has elapsed or permit the defendant to be kept in suspense as to what defense he will be called upon to make and thereby deprived prejudicially of his lawful right. Such a construction defeats the idea of law offering several remedies but providing and contemplating that any suit brought shall be held as an election.

Section 3176, R. S. A., see Appendix.

Consolidated Arizona v. Ujack, 15 Ariz., 388.

Section 710, R. S. A., 1913, provides:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

(1) Action for injuries done to the person of another."

Section 3162, see Appendix.

23 Cyc. 389:

> "A petition will not be regarded as stating more than one cause of action, for the reason that the facts are set out in different ways and the terms, like separate causes, when it is clear from the facts stated and the judgment demanded that but one cause of action exists."

Specification of Error III.

Prejudicial error occurred when the counsel for the plaintiff below made offer in evidence of unauthenticated X-Ray plates (Tr. 38). The interpretation of X-Ray plates is a matter requiring great care and expert knowledge and experience. Such plates, just as photograph plates may be developed so as to bring out certain features and tend to eliminate other features. These plates are taken so that they show only certain parts of the body, and the matter of identification of the plates as being photographs of a particular person therefore requires great care and is of exceeding importance. It is evident that these plates, if handled in development by several persons, might easily become mixed and even an expert could not identify them as being photographs of a part of the body of any particular person. It is also quite apparent that because of the practical impossibility of identification, plates depicting the condition of some other person might

be substituted, even when ordinary care was used in their handling. It seems apparent that the only method of authentication is to have proof made by the person who took the plates and developed them. It is certainly clear that there is not even the ground work of identification and authentication where plates are offered in evidence, to be interpreted by a witness who can only state that he had the plates developed, but did not take or develop them himself, and no witness is produced who developed such plates. The opportunities for an exchange of plates, error in development, and fraud and misrepresentation, are numerous under such circumstances.

In this cause the offer of X-Ray plates by the counsel of the plaintiff below, which said counsel and his expert witness knew had not been taken or developed by the latter, was made as evidence. The defendant below, through its counsel, immediately asked if the plates had been developed by the witness and when opposing counsel replied (Tr. 38) they had not been so developed, objection was promptly made and the Court excluded the plates, but this exclusion did not cure the prejudicial error against the defendant which this offer could not fail to have upon the jury. The very pointed inference the jury drew was that evidence relating to the plaintiff in the form of X-Ray photographs, was being kept from them and that on account of objection of the defendant below; whereas the fact was that the said defendant for its own protection

was compelled to object since without reasonable authentication which could not be given by the witness or the plaintiff, the plates might have been absolutely incorrect in their depiction of conditions, or might have been the plates of some other person. Without impugning the motives of the counsel in this case in any manner, in general if such an offer can be made when the counsel for the plaintiff knows that the plates are not authenticated, and if the sole remedy of the defendant is an objection, and to have the plates rejected by the Court, then it is submitted that when such a practice is established a plaintiff may, with practical impunity, make an offer of even blank plates or any kind of plates and secure a prejudicial effect on the jury's mind against the defendant, caused by the objection and rejection. There was no way in which the defendant could have prevented the offer except by objection or otherwise have avoided the effects upon the jury by reason of the circumstances surrounding the said offer. If the counsel of the plaintiff below had not known whether or not these plates were authenticated, it is submitted that he should have asked his witness the necessary preliminary questions to determine the facts and then have refrained from making any offer whatsoever, when it developed that they were not authenticated. However that may be the effect was secured to the great prejudice of the defendant. There is included in this specification to further indicate an effect prejudicial to the defendant below, as conveyed to

the jury by the offer and remarks of opposing counsel, the remark added by the said counsel to the testimony of his witness (Tr. 38) as supplementing the answer of his medical witness that the latter presumed his examination was made to determine his condition for the purpose of testifying; the said counsel added "that is provided there is anything to testify about." The plain effect upon the jury was that this witness would not have been called to testify unless he had found a very serious condition. It was for the jury to hear the testimony and the opinion, if such was asked, in proper form, of the witness, and to determine whether there was anything to testify about. The witness was not asked his opinion as to whether the condition was serious. The effect of this remark was therefore an incompetent and prejudicial opinion expressed by the counsel for the plaintiff below that the witness had found something to testify about, with the clear corollary that it was a serious condition. Whether this is reversible error or not, is a matter for discretion of this Court, but that it was prejudicial seems clear, the incident tending to emphasize the reversible error in offering the X-Ray plates, as above set out, which occurred a few minutes thereafter.

Cosselmon v. Dunfee, 172 N. Y. 507.

Iverson v. McDonnell, (Wash.) 78 Pac. 202.

Winters v. Sass, 19 Kansas 556.

In the Cosselmon case appeal was taken from

judgment for the plaintiff for personal injuries. Plaintiff's counsel had asked a witness whether the latter knew if the defendant carried accident insurance on employees. This was objected to and the objection sustained. The higher Court stated that while the trial court made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey to the jury an improper impression. The injury was not material and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and where the trial court or the appellate court is satisfied that the verdict of the jury has been influenced thereby, it should for that reason set aside the verdict.

In the Iverson case the counsel for plaintiff asked a witness in regard to liability insurance; the Court states that even asking the question is reversible error, although the Court instructed the jury to disregard it; in order to protect the defendant, its counsel was forced to object and yet by so doing admitted the fact. This is the condition with regard to the objection to the offer of the X-Ray plates; the principle of the Iverson case is applicable, and also more forceful, because in our case the Court did not instruct the jury to disregard, although such instruction would not have eliminated reversible error.

In the Winters case Justice Brewer stated that whenever in the exercise of a sound discretion, it appears to the Court that the jury may have been

infuenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, * * * then the verdict should be set aside.

Specification of Error IV.

The Court erred in admitting the American Mortality Tables (Tr. 39 and 40) as evidence over objection and exception of counsel for defendant below. The objection to the admission of these tables is upon two main grounds:

(1) That there was no evidence or proof showing the applicability of the tables to the particular plaintiff or case, and,

(2) There was no evidence of permanent injury and adequate evidence of such injury is a condition precedent to the admission of Mortality Tables in evidence under any conditions.

A careful review of many cases relating to admissibility of and instructions upon Mortality Tables shows that the cases which pass lightly upon the question of admissibility are those where this question was either taken for granted because of death or of an admittedly permanent injury or are decisions where the point was very lightly considered. It can be safely said that all the well considered cases dwell emphatically upon the uncertainty of the tables, the necessity of proof bringing the particular life within the class of lives upon which the particular table is based, the necessity of showing previous health, habits and social surroundings, the necessity of sufficient evidence of permanent

injury before the tables can even be admittd as evidence, and otherwise emphasizing the great opportunity for the jury to erroneously use the tables as generalizations and to supply proof of the expectancy of the particular life, and emphasizing the fact that the Court must exercise much care and caution in dealing with that sort of evidence. Wigmore states they are "among the least trustworthy of scientific evidence," and in Grier v. Louisville R. R., the Court comments upon the necessity of taking such evidence subject to the conditions surrounding the particular individual, and that the mere probable duration of life and not duration of ability to work is shown, and then states that on the whole it would be better if the jury were instructed to take into consideration other elements and not these tables.

(1) There was no evidence or proof showing that the Mortality Tables were applicable to the plaintiff below. It is manifest that a man following a hazardous occupation is not within the class of the selected lives upon which the American Mortality Tables are based. No attempt even was made to introduce proof bringing the plaintiff within that class and no evidence was introduced to show even broadly in what respect the fact that plaintiff followed a hazardous occupation would modify any applications of the tables to his case. The jury were instructed (Tr. 53) to consider the fact that the plaintiff was engaged in a hazardous occupation as tending to show that his expectancy would be

less than the tables, but there were no tables or evidence introduced to show how much less the expectancy of life would be, whether one year or ten years or more, and the jury had no intelligent basis whatever upon which to found any reasonable conclusion or to act other than upon pure conjecture and guess work. Further, there was no evidence introduced relative to the previous habits and social surroundings of the plaintiff below, which is necessary evidence to show whether or not he could bring himself within the class of selected lives in those respects. The judge of the trial Court showed appreciation of the deficiency of the evidence in this regard (Tr. 40) when he stated to counsel for the said plaintiff, "Yes, but there is one particular in which you haven't brought yourself within that rule, that is that you have not shown anything as to the plaintiff's previous habits * * *" and upon response of the said counsel inquiring whether the presumptions would not aid, the Court said, "Very well, I have ruled with you, so if you are willing to take the chance, very well."

To contend, as counsel for plaintiff did, that the presumptions as to habits would take the place of evidence, is to avoid the whole question and is directly contrary to authorities; there can be no such presumptions; affirmative evidence must be introduced to show the application of the tables to the particular life. If it were presumed that a man was healthy, had good habits and had normal social surroundings, and other features, the plaintiff

would have no case to prove whatever, but the authorities clearly show that affirmative proof of necessary facts is essential.

Kerrigan v. Pa. R. R., 44 A. 1069.

Rooney v. N. Y., N. H. & H. R. R., 58 N. E. 435.

Steinbrunner v. Pitts. Ry. Co. (Pa.), 28 Am. St. Rep. 806.

Ward v. Dampskibsselskabet, 144 F. 524.

City of Friend v. Ingersoll (Nebr.), 58 N. W. 281.

7 Ency. of Evidence, 426.

Kahn v. Herold, 147 Fed. 575.

Grier v. Louis. R. R. (Ky.), 42 Am. St. Rep. [illegible].

17 Corpus Juris 875, Note 84a.

Pauza v. Lehigh Valley Coal Co. (Pa.), 80 A. 1126.

(2) There was no evidence of permanent injury, which is a condition precedent to the admission of such tables. Before Mortality Tables are admissible as evidence in a case of personal injury where death does not result, there must be evidence of permanent injury. In MacGregor v. R. I. Co., 60 At. 761, the Court states:

> In case of injury resulting in the loss of an eye or limb, it is obvious that the element of permanency is necessarily implied, but there are many injuries, the description of which shows their permanency is merely probable and others where permanency is

> more improbable, but nevertheless within possibility; to be entitled to recovery for apprehended future consequences, there must be such degree of probability as amounts to reasonable certainty. A careful consideration of the medical testimony shows no evidence of permanency since no one of them (physicians) testified that their permanency is even probable. Their utmost claim is that the injury may last indefinitely. The admission of Mortality Tables was held improper and the judgment reversed with the statement that while it was not possible to determine accurately upon what testimony the jury based the verdict, if the amount is based upon permanent injury, it is sufficient to say the evidence does not warrant a finding of permanent injury.

This MacGregor case illustrates the rules laid down by other cases that the Court determines whether or not there is evidence of permanent injury and requires that there be such evidence before it will permit the introduction of Mortality Tables. Where the permanency of the injury is merely a probability or a possibility, there must be evidence to a reasonable certainty, and only the evidence of physicians can determine that point, as stated in the above quotation, and as stated in Filer v. N. Y. Central Railroad Company, "there is no evidence other than that of experts, by which courts and juries can determine whether a disease or an injury has been or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future." The only testimony with reference to the character and

extent of the injury to the plaintiff below was that of his expert witness and this has been set forth in full (Tr. 38). The only portion of the testimony which could be construed by conjecture to indicate, or to have been intended by the witness to indicate, any incorrect condition is the statement that the plaintiff had a starting hernia and had lost about fifty per cent of the power of his right hand. By no reasonable construction can these statements be stated to indicate to a reasonable certainty any evidence of permanent injury or any opinion by the witness that they were considered by him to be permanent, but regardless of that, this evidence was irrelevant and should not be considered because the plaintiff's complaint (Tr. 1 to 6) makes no allegation whatever of any injury to his hands or any hernia or injury of that kind or in that vicinity. Further, the examination occurred two years after the accident and was so remote that various conditions in no way attributable to the accident might have arisen. Even if it were reasonably possible to consider the hernia as an injury included among those alleged in the complaint, which it is not, there is even then no evidence or opinion of the witness that the said hernia was serious, or not removable by treatment, much less was there any evidence of the permanency or permanent incapacity. The remaining portion of the evidence of the physician showed clearly that the fractured condition had been repaired by nature and united, without any evidence whatever or any reasonable inference that

there was any serious, much less permanent injury or incapacity. An injury may be serious, but it is not for that reason permanent. The evidence of the plaintiff below was that within fifteen minutes after the accident he arose and walked, that he stayed in the hospital only about two weeks (Tr. 34 to 37), and the unrefuted testimony of the other physicians (Tr. 44 to 46) that a man suffering from any serious fracture of the fifth lumbar vertebra would have been partially, if not totally, paralyzed immediately after the fracture, corroborated and confirmed the testimony of the plaintiff's medical expert in relation to the repair by nature, if the said injury were in fact due to the accident. Also the plaintiff himself states in his testimony (Tr. 37) that he was better and had done easy work. The plaintiff in error therefore submits to this Court that there is no evidence of permanency of any injury alleged in the complaint to have been sustained as the result of the alleged accident, not a particle of evidence, and the rule of law is that there must be sufficient evidence, to a reasonable certainty. As stated in Pollock v. Pollock, 71 N. Y. 104, it is error of law to find a material fact when there is a total absence of evidence to sustain it. "Insufficient evidence is, in the eye of the law, no evidence." "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." The Judge of the trial Court manifestly

took the position that it was for the jury to determine whether or not the evidence proved permanent injury or whether or not there was any evidence showing a permanent injury (Tr. 56 and 57) and he therefore admitted the tables in spite of the fact that there was no sufficient evidence of the permanency of the injuries alleged in the complaint to have been sustained as the result of the accident. The authorities show the rule to be that where there is conflict of testimony as to whether or not an injury is permanent, then the determination of that question is for the jury, and tables may be considered if properly introduced, only in the event the jury finds permanent injury. In this case there was not only no conflict of testimony, but there was no evidence of permanent injury.

Tweedy v. Inland Brewing Co. (Wash.), 134 Pac. 468.

Filer v. N. Y. C. R. R., 49 N. Y. 43.

MacGregor v. R. I. Co., 60 At. 761.

Mott v. Detroit G. H. & M. R. Co., 79 N. W. 3.

Leach v. Det. Elec. Co., 84 N. W. 316.

W. U. Tel. v. Morris, 83 Fed. 992 (C. C. A.)

Sax. v. Det. G. H. & M. R., 84 N. W. 314.

Tenney v. Rapid City (S. D.), 96 N. W. 96.

Foster v. Village of Bellaire, 86 N. W. 383.

Hardy v. Milwaukee St. Ry. Co., 61 N. W. 771.

St. L. & S. F. R. R. v. Nelson (Tex.) 49 S. W. 710.

Tex. Mex. Ry v. Douglas (Tex.), 7 S. W. 77.

City of Honey Grove v. Lamaster (Tex.), 50 S. W. 1053.

City of Friend v. Ingersoll (Nebr.), 58 N. W. 281.

Remsnider v. Union Sav. & Tr. Co. (Wash.), 154 Pac. 135.

City of Shawnee v. Slankaid (Okla.), 116 Pac. 803.

Thayer v. Den. & R. G. R. R. (N. Mex.), 154 Pac. 691.

Snyder v. Gt. Nor. Ry. (Wash.), 152 Pac. 703.

Specification of Error V.

The Court erred in denying the motion of the plaintiff in error for a directed verdict, because there was no evidence to show that the defendant in error was not negligent, or that his negligence did not cause the accident (Tr. 46 and 47). While it is true that under the Common Law there is a presumption against negligence in most cases, this action was prosecuted under a statutory remedy, and one of the necessary elements of this remedy is that the accident be not due to the negligence of the employee. (See Appendix.) To maintain his action under the statute, the plaintiff must allege and support by evidence all the elements required

by that statute to be alleged and proved, and one of those elements is allegation and proof that the plaintiff was not negligent, and this must be alleged and proved before recovery can be had under the statutory remedy, just as at Common Law a common carrier must prove that it was not negligent in order to relieve itself of responsibility and liability on account of loss of goods while in its possession.

Calumet and Arizona Mining Company v. Chambers (Ariz.), 177 Pac. 839.

Pollock v. Pollock (above).

Section 3158, R. S. A. (Appendix.)

The Warren Adams, 74 Fed. 413.

Hudson R. L. Co. v. Wheeler Eng. Co., 93 Fed. 374.

The Warren Adams, 74 Fed. 413.

Hudson R. L. Co. v. Wheeler Eng. Co., 93 Fed. 374.

St. Louis Cordage Co. v. Miller, 126 Fed. 508.

Specifications of Errors VI, VII and VIII.

These three specifications may be presented in conjunction, since they all relate to the instructions given by the Court with regard to Mortality Tables which instructions are set out verbatim therein. The defendant below objected to the admission of American Mortality Tables and excepted to the rule permitting their admission, and this exception would reach any instructions given or omitted to be

given in regard to this evidence erroneously admitted to the prejudice of the defendant. But specific objection was also made and exception allowed to the instructions of the Court in relation to Mortality Tables, and generally as presuming the permanency of the injury (Tr. 56 and 57). The authorities cited in the argument under Specification IV above show that the Court, by its very act of admitting these tables did in real effect, whether intentionally or not is immaterial, presume the permanence of the injury, or that there was sufficient evidence of permanency to raise a conflict of evidence thereon, since there must be evidence of permanent injury in order to warrant even the admission in evidence of such tables.

The whole tendency of the instructions of the Court, taken as a whole, and particularly with reference to Mortality Tables, showed an assumption that there was evidence of permanent injury, and further, the instructions set out in Specification No. IX show that the Court, in effect, assumed the fact of permanent injury. The remark of the Court to the objection made on this point by the plaintiff in error (Tr. 56) that the Court did not assume permanent injury, but that was a question for the jury, could not cure the erroneous instructions, (1) because the remark still assumed there was evidence of permanency and permitted the jury to consider the issue of permanency when there was no evidence, in law, to warrant such submission to the jury, and (2) because such general remarks do not

cure erroneous instructions; as stated in St. Louis I. M. & S. Ry. v. Needham, 52 Fed. 371, where the trial court had given instruction and of its own motion added a general statement modifying the charge, and the appellate court remarked, "this particular portion of the charge (the remarks), standing alone, is not objectionable; but general remarks of this character in the course of a charge, while they may tend to show the Court really entertains sound views of the law, do not extract the vice of an erroneous instruction, positive in its terms, which directs the jury to allow damages on a wrong basis."

Furthermore, in those cases where the facts are such that Mortality Tables are admissible, great care must be taken by the Court to see that evidence of all essential conditions exists in the case and to fully instruct the jury concerning the use of the tables and to instruct that the tables are not accepted as establishing the expectancy, but only as a possible aid in view of all the conditions surrounding the particular life in question; all the circumstances affecting the probable duration of life should be called to the attention of the jury in order that they may have an intelligent understanding of what their duty is in determining the life expectancy in the particular case, and the jury must be told that they are at liberty to disregard the tables altogether and arrive at a result independent thereof. Matters of this kind affecting the individual life in question must, as stated in several

of the authorities cited, be pointedly brought to the attention of the jury by instructions and a failure to do so is ground for reversal. The case of Florida Central Railroad v. Burney considers at length the matter of inadequate and erroneous instructions on Mortality Tables, and the Georgia Supreme Court sets forth therein forms for instructions on such tables for the use of courts and in order that instructions might, in the future, be adequate, and not give grounds for reversal on account of their insufficiency. An examination of these instructions shows that the instructions given by the Court in the present case are inadequate in most of the material and essential particulars, which the Georgia Court considered essential.

Vicksburg & Mer. R. R. v. Putnam (U. S.), 30 L. Ed. 257.

St. Louis I. M. & S. Ry. v. Needham, 52 Fed. 371.

Seigfred v. Pa. R. R., 55 A. 1061.

Steinbrunner v. Pitts Ry. Co. (above).

Florida Central R. R. v. Bruney, 98 Ga. 1, 26 S. E. 730.

Rooney v. N. Y. N. H. & H. R. R. (above).

Pauza v. Lehigh Valley Coal Co. (above).

Also authorities cited under Specification of Error IV, above.

Furthermore, the instruction in Specification of

Error VIII that the American Mortality Tables were made up on the basis of the "average man of good health" is incorrect and erroneous because those tables are not so made up, but are made upon the basis of selected risks. (Kerrigan v. Pa. R. R. and City of Friend v. Ingersoll, supra). This incorrect statement was prejudicial to the plaintiff in error because the jury were instructed in effect that the tables were made up on a basis more nearly applicable to the conditions of life expectancy of the defendant in error than they are in fact, and the Court emphasizes this prejudicial error in its instructions (Tr. 55, lines 7-8) by identifying plaintiff's life expectancy to be the same as that of the average man of forty-two years. When false impressions may have been raised in the minds of the jury by evidence or instructions, there should be a new trial. (McDaniel v. McDaniel, supra). The wording of this instruction to the effect that the fact a man is engaged in a hazardous occupation is a circumstance to be taken into consideration by the jury "as tending to show" that the expectancy of life of those in a hazardous occupation is less than the tables would indicate illustrates further the absolute indefiniteness and lack of any basis whatever, except unlimited conjecture and guess upon which the jury could rely in determining to what extent the fact of working in a hazardous occupation would lessen the life expectancy table for the said hazardous occupation. Under the instructions stating the fact as "tending" to show a less ex-

pectancy, the jury might have concluded that there was in fact no such lessening in case of hazardous employments. The fact is that the expectancy is positively less, else the Court would not be justified in making the modified instruction, but the question to be determined was how much less, and upon this point the jury had no evidence and instruction and were left to absolute conjecture and guess.

Specification of Error IX.

The instruction set out verbatim in this specification clearly imports that if the jury found for the plaintiff, they should take into consideration the elements which are stated therein, all of which are elements of future damages on account of permanent injury and incapacity and the manifest interpretation that any reasonable juror would place upon the instruction is that if he found for the plaintiff at all he should take all these elements into consideration, whereas the consideration of such elements would be of necessity wholly erroneous and irrelevant if the jury found, as they had a right to find, and could have found, that the plaintiff had suffered only temporary injury; and furthermore, this charge apparently assumes a case where there is total loss of earning capacity, whereas there was no evidence or proof thereof in this case. In fact the plaintiff admitted that he had worked and and that he was at the time of the trial able to do some kinds of work, and his complaint

(Tr. 3, Par. 5) simply alleges that his power to labor has been "diminished."

Even if this charge had been intended by the Court to be applied in case the jury found future damages, and had been qualified and restricted to that condition, it would still have been erroneous (1) because as shown in the argument under Specification IV above, there was no evidence of future damages reasonably certain to result from the injury complained of, no evidence that such damages would inevitably and necessarily result, although such proof is required, and there is no evidence other than that of experts to determine the effect in the future of a case of this kind. "Testimony of the condition up to the time of the trial with no evidence the condition would continue is not sufficient to justify the jury in considering future damages" (Shultz v. Griffith, 72 N. W. 445); (2) the instruction manifestly imports a case of future damages due to permanent injury, whereas permanent injury is not the only condition to justify future damages, since there may, in a proper case, be future damages, limited to cover a restricted damage, not due to any permanent injury.

While it is manifest that this erroneous instruction influenced the verdict, it is not necessary for the plaintiff in error to show that the erroneous instructions, or any erroneous instruction, influenced the jury. If the Court, in its instructions to the jury, erred with respect to some proposition of law, "it is well understood that the right of the defeated

party does not depend on his showing that the error actually influenced the verdict." (McDaniel v. McDaniel, supra).

Washington & G. R. R. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284.

Strohm v. N. Y. L. E. & W., 96 N. Y. 304.

Main v. Grand Rapids G. H. & N. Y. R. R. (Mich) 174 N. W. 157.

Ayres v. Del. L. & W., 158 N. Y. 254.

Daigneau v. Grand Trunk R. R., 153 Fed. 593.

U. S. Cast Iron Pipe v. Eastham, 327 Fed. 185.

Specifications of Errors X and XI.

Each of these specifications are covered by the foregoing argument, and all thereof, which is directed to each of them, and it is submitted that these specifications are well taken. In reference to the excessiveness of the verdict of $7500, it is self evident that only proof of permanent injury and incapacity could have, under any circumstances, warranted such an amount and there was no evidence, to a reasonable certainty or at all, in law, there was no evidence of medical expenses incurred, of permanent injury or future damages due thereto; or of other expenses of this kind; the defendant in error testified that he had worked during part of the time before the trial and was able to do at least some kinds of work at that time.

There is no other explanation than that the jury acted upon the basis of conjecture and guess, that evidence does not sustain the verdict and the verdict was accordingly found under the influence of passion and prejudice. "Where the verdict is for a sum greatly disproportionate to the injury, that is, of itself, evidence that it was rendered under the influence of passion or prejudice." Estees, Pleading, Vol. III, Par. 4909.

The authorities cited below show much smaller verdicts for manifestly more serious injuries, and therefore show that the verdict in this case was exorbitant under the facts and circumstances, as they are and as proved by the evidence.

The Grecian Monarch, 32 Fed. 635.

The Iroquois, 113 Fed. 964.

Sheyer v. Lowell (Cal.), 66 Pac. 307.

Leeson v. Sawmill Phoenex (Wash.), 83 Pac. 891.

Klein v. Phelps Lumber Co. (Wash.), 135 Pac. 226.

Missouri Pacific Ry. Co. v. Tex. Pac. Ry. Co., 41 Fed. 311.

Hamburg American Co. v. Baker, 185 Fed. 60.

The Anchoria, 113 Fed. 982.

Louisville & N. R. Co. v. Subant, 96 Ky. 197; 27 S. W. 999; (Century Digest Vol. 15 Column 2114).

Wood v. Louisville and N. R. Co., 88 Fed. 44.

Engler v. W. U. Tel. Co., 69 Fed. 185.

Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284.

Tweedy v. Inland Brewing Co., 134 Pac. 468.

Mason v. Lord, 40 N. Y., 476.

Putnam v. Hubbell, 42 N. Y. 106.

Mathews v. Coe, 49 N. Y. 60.

Snyder v. Great Northern, 152 Pac. 703.

In the Tweedy case: it is error for a court to find a fact, unsupported by evidence, or refuse to find a fact proved by uncontradicted evidence, and such a case is reversible.

In the Mathews case the court stated a finding of fact without evidence or wholly against undisputed evidence is an error in law.

CONCLUSION.

Various of the errors specified are so distinctive and different that the argument thereon is necessarily separate and somewhat unrelated to the other several specifications, except as all of them show the factors which support the claim of the plaintiff in error that substantial justice was not done in the trial and by the verdict and judgment and the Employer's Liability Law of Arizona under which the trial proceeded can fairly be stated to be still open to broad and uncertain interpretations, and it has

thus far been very meagerly passed upon except in restricted features by appellate courts. The five to four decision of the United States Supreme Court in the case of Arizona Copper Company v. Hammer, 63 L. Ed. 1058, suggests the uncertainty and possibility for different constructions of various features of the law. This Hammer decision also strongly intimates and suggests that the courts will be presumed and expected to see that the operation of said law is kept within the proper scope and especially with reference to excessive verdicts that are quite possible under an unlimited liability as created by the statute. By reason of the very fact that this law places unlimited liability upon an employer, an unusual condition among laws of the States, the courts must give a reasonable construction to the law to protect the employer in those features thereof which place limitations upon its operation. Under this view, therefore, the plaintiff in error earnestly presses its contention of error in the denial by the lower court of its motion for security for costs and of the denial of its demurrer and in lieu thereof the granting by the court to the defendant in error of the privilege of election to proceed under the Employer's Liability Law, said election being more than two years after the accrual of the action, and contrary to the Arizona laws providing that election of a remedy must be made by an employee within the said period of limitations. In several instances employees have brought actions, as in this case, alleging two inconsistent

causes and have been allowed by the rule of the courts to permit the complaint to stand until just before the time of trial and then to proceed upon whichever cause plaintiff chose. When a complaint, incorporating two such inconsistent causes, as in this case, is permitted to stand until after the two years has expired and then the plaintiff is permitted to make an election, the said limitation is thereby made ineffective and void and is decided to the manifest prejudice of the defendant. In this case the record shows that the plaintiff had been allowing his case to lie dormant; he had even failed to appear by counsel when the case was called August 4, 1919, but shortly before the trial and more than two years after the accident he secured new attorneys, who in fact, took the case up anew and were permitted to then make an election. The plaintiff in error had, at all times, for two years been ready and present at the term of court to proceed with the case, but the defendant in error was not so ready and present. The plaintiff in error had the right, under such circumstances, to infer that the defendant in error was not expecting to press his cause; and surely the plaintiff in error had the right to expect that no additional privilege would be given the defendant in error as a right after the two-year limitation had expired. It is submitted that the only reasonable and just conclusion, as well as the only lawful construction of the said laws of Arizona, is that an employee, having the liberal privileges which have been extended to him and having three

remedies to select from, must make his selection before the two-year limitation expires. This seems a very small requirement to ask of the employee in return for the manifest privilege the laws give him, and no practice or subterfuge should be encouraged or permitted which will allow the employee to, in effect, make void that provision of the law.

The specification based upon the offer of the X-Ray plates is prejudicial error, on account of which the Court should set aside the judgment. The right does not depend on showing that the error actually influenced the verdict, but the effect of this offer must have influenced the jury in arriving at its verdict, for the evidence in the case would not warrant the jury in returning a verdict of $7500.00. The rule is stated by the court in McDaniel v. McDaniel, supra, "a verdict should be set aside whenever the error or misconduct renders it reasonably doubtful whether a verdict has been legitimately procured."

The specifications with reference to erroneous admission of Mortality Tables as evidence and the expressed doubt of the judge thereon, of the instructions based thereon, and of the erreoneous instructions presuming permanency of injury, have been set out at some length and we trust with sufficient clearness and fullness to impart to the court the confidence we have that the errors were unquestionably prejudicial and reversible, and the admission of the American Mortality Tables based upon selected insurance risks and the instructions and

omissions to instruct thereon, all produced the effect that there was evidence of permanent injury and there was permanent injury. There is no conflict of evidence in regard to the injury. The only evidence thereof was that of the expert witness of the plaintiff below, who stated what he found as a result of his physical examination. There was no cross-examination of this witness. The evidence of the witnesses of the defendant below was based upon hypothetical questions and showed what would have been the result if said fracture mentioned by plaintiff's physician had been serious. The plaintiff's physician did not state any opinion whether he considered the condition serious or not and the result of the whole medical testimony, standing uncontradicted with reference to the injuries alleged in the complaint, is that the physical examination was made after two years and just before the trial, and showed there had been injuries to the scapula and fifth lumbar vertebra at some time, that some of these injuries consisted of fractures, that they had been repaired by nature and united, and that the said injuries must have been slight if they occurred at the time of the accident because if there had been serious fractures of the vertebra at least partial paralysis would have followed, whereas the testimony of the plaintiff himself showed that he did not, at any time, suffer from such paralysis, but worked shortly after the accident and his physician admitted (Tr. 46) the injury was not such as to necessarily cause paralysis. There was no testi-

mony offered that there would be any future consequences whatever. If there were to be future consequences, there should have been introduced some testimony as to how long they might last. If it is possible to say that there is evidence of permanent injury because an examination shows that there have been injuries or fractures to a scapula or to a vertebra that have been united and repaired by nature, then what kind of evidence could possibly be submitted in order to show that the injuries or fractures had been temporary injuries and had been repaired? If the aforesaid evidence of repaired and united fractures shows permanent injury, then every case where there have been fractures, which have united and been repaired, is irrevocably a case of permanent injury and there can be no such thing as a temporary injury where such fractures occur. Such is contrary to common sense and to the evidence in this case and is inconsistent even with the instruction of the court that the jury were to be the judges to what extent "as a result of said injury his spinal column has been impaired or his shoulder blade or shoulder has been injured and whether or not these incapacitations, if any, are permanent or merely temporary." Our confidence in our contention of the absence of evidence of permanency and the consequent errors in admission of Mortality Tables and of instructions upon permanency, is based upon the cases which have been cited; particular attention is drawn to the case of Snyder v. Great Northern Railway Company, 152

Pac. 703, as almost parallel in facts, but making this present case even stronger, as one where there is no evidence of permanent injury and one where it was reversible error to admit Mortality Tables.

The plaintiff walked into court and took the stand unaided, without any claim of deformity or of being crippled, or any evidence thereof. If a plaintiff in such a condition and upon the testimony in this case can obtain a verdict as for future and permanent injuries in the sum herein given, and such a verdict be allowed to stand, then the law in regard to the necessity of evidence to sustain a verdict is vain and of no effect, and the assumption of the Supreme Court in the Hammer case is not, it is submitted, being met by the courts in actual practice.

We submit therefore that errors prejudicial to the plaintiff in error occurred as hereinbefore specified, that the trial court erred to the prejudice of the plaintiff in error in the matters and things enumerated, that the verdict is for said reasons contrary to law, excessive, and deprives the plaintiff in error of property without due process of law, and said verdict and judgment should, in justice and right, be set aside and such other proper action taken by this Court as may seem meet.

Harrow & Cornick

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United Verde Extension Mining
Company, a Corporation.

APPENDIX.

EMPLOYER'S LIABILITY LAW.

Revised Statutes of Arizona, 1913.

Chapter Six, Title Fourteen.

Section 3153. This chapter is and shall be declared to be an employer's liability law as prescribed in section 7 of article XVIII of the state constitution.

Section 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Section 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

Section 3156. The occupations hereby declared

and determined to be hazardous within the meaning of this chapter are as follows:

* * * * * * * * *

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

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Section 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

Section 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased.

Section 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the

question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Section 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

Section 3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Section 3176. * * * * * * *

Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State

Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.